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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1542

JAMES BROWN HARDY, ACTING WARDEN OF THE MARYLAND STATE PENITENTIARY,

*Petitioner.*

v.

MILAN M. VUITCH, M.D.,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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No. ------

JAMES BROWN HARDY, ACTING WARDEN OF THE MARYLAND STATE PENITENTIARY,

*Petitioner,*

v.

MILAN M. VUITCH, M.D.,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

James Brown Hardy, Acting Warden of the Maryland State Penitentiary, by Francis B. Burch, Attorney General of Maryland, and Francis X. Pugh, Assistant Attorney General of Maryland, his attorneys, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on February 20, 1973, which affirmed the Order of the United States District Court for the District of Maryland of June 22, 1972, which had granted Respondent's Petition for Writ of Habeas Corpus, setting aside Respondent's conviction under the Maryland therapeutic abortion statute, and holding the statute to be unconstitutional.

## CITATIONS TO OPINIONS AND ORDERS BELOW

The unreported Memorandum Opinion and Order of the United States District Court of February 17, 1972, appears at Appendix 1a.

The Order of the United States Court of Appeals of March 9, 1972, appears at Appendix 5a.

The Order of the United States Court of Appeals of March 30, 1972, denying the petition of Petitioner for a rehearing in banc, appears at Appendix 7a.

The unreported Memorandum Opinion and Order of the United States District Court of June 22, 1972, appears at Appendix 7a.

The Per Curiam Order of the United States Court of Appeals of February 20, 1973, appears at Appendix 18a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 20, 1973. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Had Respondent exhausted his state remedies prior to filing his petition for writ of habeas corpus where no effort had been made by him to first seek relief under the Maryland Post Conviction Procedure Act?

2. Should the United States District Court have dismissed Respondent's petition for writ of habeas corpus under the principle of abstention where the identical issues raised in his petition had also been raised by him for determination in a pending prosecution in a state court?

3. Should Respondent's conviction for performance of an abortion in a place other than a licensed and accredited hos-

pital in 1968 be set aside as the result of retroactive application by the Court of medical data accumulated subsequent to 1968, where the virtually unanimous medical opinion in 1968 endorsed the hospital requirement?

## STATEMENT OF THE CASE

Respondent, a physician licensed to practice medicine in the State of Maryland, was tried before a jury in the Circuit Court for Montgomery County, Maryland, on a charge of performing an abortion in a place other than a licensed and accredited hospital on November 23, 1968. Article 43, Section 137, *et seq.*, Annotated Code of Maryland, 1971 Replacement Volume (App. 19a). The witness in that case, Rebekah Jayne Dodson, 19 years old, testified that she became pregnant and decided to have an abortion. She was referred to Respondent's office, where she was examined by Respondent on November 21, 1968. Pursuant to his instructions she returned to his office on November 23 with $300, at which time he performed an abortion.

After the State had completed its case-in-chief, Respondent filed a written motion for a judgment of acquittal (Maryland Rule of Procedure 755, App. 23a) on the ground (a) that the State's evidence was legally insufficient to support a guilty verdict, and (b) that "Section 149G of Article 43 * * *, making it a crime to terminate a human pregnancy, other than by a licensed physician in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene which is the sole legal basis * * * [for the charge] is an unwarranted discrimination against this Defendant, a physician licensed by the State of Maryland, in favor of practitioners of medicine in accredited and licensed hospitals; the sweep of the statute is unnecessarily broad and invades the area of protected freedoms of both the pregnant woman and the

Defendant, a licensed physician, in the private pursuit of their lives and duty, and is without compelling State interest sufficient to justify this encroachment upon personal liberty, and, consequently, Section 149G * * * is invalid and unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, * * *." In support of his motion, Respondent presented oral argument on the question of the legal sufficiency of the evidence to support a guilty verdict; he presented no argument or evidence whatsoever in support of his constitutional claim, and the court denied the motion without commenting thereon. Respondent then offered evidence, and by so doing he withdrew his motion. Rule 755 (*supra*).

A pathologist, called to testify by Dr. Vuitch, who had examined placental tissue which had been removed from Miss Dodson, conceded that it was connected with a twelve week pregnancy.

At the end of the entire case, Respondent orally renewed his motion, again without advancing any argument or evidence to support his constitutional claims, and again the court denied the motion without commenting thereon. The jury found Dr. Vuitch guilty and he was sentenced to pay a $5,000 fine and to imprisonment for three years, with a proviso for suspension of sentence and probation after serving one year.

On appeal, the Maryland Court of Special Appeals, 10 Md. App. 389, 271 A.2d 371 (printed in Appendix in 70-1533, infra), refused to rule on the constitutional issues Dr. Vuitch sought to raise since they had not been raised at trial in the correct procedural manner and because no evidence necessary to a proper and intelligent consideration of the question had been presented. The issue should have been raised prior to trial. Maryland Rule 725 (App. 21a). Certiorari was there-

after denied by the Maryland Court of Appeals, 261 Md. 729, and by the United States Supreme Court on October 12, 1971, 30 L. Ed. 2d 112, No. 1533, October Term, 1970.

On the very next day, October 13, 1971, Dr. Vuitch filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Maryland, together with an application for bail. The State of Maryland filed a motion to dismiss the Petition for Writ of Habeas Corpus on grounds that Dr. Vuitch had not exhausted his State remedies in that he had not sought relief in the State courts under the Maryland Post Conviction Act. Article 27, Section 645A, *et seq.*, Annotated Code of Maryland, 1971 Replacement Vol. (App. 2a). A motion was also filed opposing the granting of bail.

On February 17, 1972, the District Court denied the motion to dismiss the petition, holding that State remedies had been exhausted, but granted the motion to deny the application for bail, holding that there were not present such exceptional circumstances as would justify granting bail (App. 1a). On February 23, 1972, United States Circuit Judge Harrison L. Winter issued a stay to the Order denying bail.

The matter was considered by a panel of three Circuit Judges, and an Order was issued March 9, 1972, reversing the Order of the District Court which had revoked bail. A Petition For Rehearing In Banc was filed. This Petition was denied on March 30, 1972. Thereafter a Petition for Writ of Certiorari was filed and was denied by this Honorable Court. 41 L.W. 3135, No. 1686, October Term, 1971.

A hearing on the merits of the habeas corpus petition was held in the District Court on May 19, 1972.

On June 22, 1972, the United States District Court granted the writ and held the Maryland Therapeutic Abortion Statute unconstitutional, rejecting Petitioner's request for dismissal on grounds of abstention (App. 7a).

On February 20, 1973, the United States Court of Appeals affirmed the order of the District Court, holding that Respondent had exhausted his State remedies (App. 18a). The Court omitted ruling on the issue of abstention.

## REASONS FOR GRANTING THE WRIT

1. There are direct conflicts between the Fourth Circuit's opinion in this case and recent decisions of this Honorable Court concerning exhaustion of state remedies and abstention.

2. The Fourth Circuit's opinion established a new kind of retroactivity, not of law or principle, but of knowledge or fact, in that the Court applied medical data which came into existence subsequent to the conviction, as the basis for holding the statute, under which the conviction was obtained, unconstitutional.

### I.

### CONFLICTS WITH DECISIONS OF THIS COURT

(a) *Exhaustion of state remedies.* As indicated above, the issues presented in his petition for writ of habeas corpus had never been fairly presented for determination in the state courts. They had not been raised at trial in a proper procedural manner and additionally were presented without any evidence which the state courts, on appeal, held was necessary to a proper and intelligent consideration of the questions presented. No effort was made to raise the issue under the State Post Conviction Statute. Therefore, the decision of the United States Court of Appeals is authority for the proposition that one has exhausted his State remedies for purposes of habeas corpus even if the point at issue had been raised in complete disregard for the State court's rules of procedure and even if it had been raised in the State courts without presentation of any relevant and necessary testi-

mony or other evidence. It is respectfully submitted that in so holding, the Fourth Circuit conflicts with Title 28, Section 2254(b) and (c), U.S.C.A., which provides as follows:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."
>
> "(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The holding is also in conflict with the holding of this Court in many cases, including *Picard v. Connor*, 404 U.S. 270, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971), at 30 L. Ed. 2d 444:

> "The question here is simply whether, *on the record* and argument before it, the Massachusetts Supreme Judicial Court had a *fair* opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction. We think not." (Emphasis supplied.)

(b) *Abstention.* Petitioner and Respondent agreed, by stipulation entered into the record at the hearing in the United States District Court, that all the constitutional points which Respondent sought to have determined by the District Court had been raised by Respondent in a pending prosecution in a State Court. The District Court rejected the issue of abstention raised by Petitioner. Although raised by Petitioner on appeal, this point was not ruled upon by the U.S. Court of Appeals, which however affirmed the decision of the District Court. The result is to bring the Fourth

Circuit into direct conflict with many recent cases of this Court, including *Roe v. Wade*, U.S. , 35 L. Ed. 2d 147, 93 S. Ct. 705, where this Court stated in a very similar factual situation, at 35 L. Ed. 2d 162:

> "Dr. Hallford is therefore in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad faith prosecution. In order to escape the rule, articulated in the cases cited in the next paragraph of this opinion, that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a 'potential future defendant' and to assert only the latter for standing purposes here.
>
> "We see no merits in that distinction. Our decision in Samuels v. Mackell, 401 U.S. 66, 27 L. Ed. 2d 688, 91 S. Ct. 764 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. * * *"

There was no allegation or showing of irreparable injury, bad faith harassment, or a threat to a federally protected right which could not have been eliminated by a defense against a single criminal prosecution.

## II.

### RETROACTIVITY

The Maryland Therapeutic Abortion Statute accorded minimal rights to the fetus prior to viability, subject to the health, and other, requirements of the pregnant woman. After viability (twenty-six weeks of gestation) the fetus was deemed to have acquired the rights of a person so that the right of the woman to thereafter obtain an abortion was greatly restricted. The Maryland statute, adopted in 1968, was the statutory enactment of the guidelines proposed by the Medical and Chirurgical Faculty of Maryland (Maryland Medical Society). The only thing made a crime under the statute was the performance of an abortion by other than a licensed physician and in a place other than a licensed hospital, accredited by the Joint Commission on Accreditation of Hospitals (JCAH). At that time (1968) the health and complication risks of abortions were largely unknown, and restricting abortions to hospitals seemed reasonable and proper to virtually the entire medical community, including the physicians who testified for Respondent in the District Court. The JCAH accreditation requirement at that time accomplished several purposes:

(a) It established basic standards for facilities and staff before experience with abortions could establish specific standards.

(b) It served to insure the statistical and study requirements of the statute were met, to bring about the needed increase in knowledge of the medical aspects of abortion.

(c) It served as a means of enforcing the statute, so that, for example, the rights of the viable fetus were recognized and respected. Compliance with the law is a prerequisite to maintaining JCAH accreditation.

Unlike the situation elsewhere, the JCAH requirement had only a *de minimus* effect on the number of hospitals available to perform abortions. Evidence at the State criminal trial showed that Respondent performed the abortion in 1968 in his office in complete disregard for the Maryland statute. He made no showing that the abortion could not have been done in a hospital or that any effort whatsoever was made to comply with the law. The evidence showed that the girl in question was twelve weeks pregnant so that the abortion was performed at approximately the end of the first trimester.

The Fourth Circuit's holding conflicts with this Court's holding, that the State has a legitimate interest in maternal health and in the fetus, which interests become compelling at approximately the end of the first and second trimesters, respectively. *Roe v. Wade, supra,* 35 L. Ed. 2d at 175, 180-183. Evidence accumulated since 1968 tends to show that the JCAH accreditation requirement is unnecessary, but this was not apparent in 1968. "A State is not to be reproached, however, for a past judgmental determination made in the light of then-existing medical knowledge." *Doe v. Bolton,* U.S. ..... , 35 L. Ed. 2d 201, 212, 93 S. Ct. 739.

Setting aside Respondent's conviction therefore opened a new dimension in retroactivity, that of knowledge or fact. If later acquired knowledge, in this case medical knowledge, can be applied retroactively to set aside a conviction for a criminal act performed prior to the time such knowledge came into existence, many criminal convictions would never become final but would remain contingent upon such things as future technological or scientific discoveries or advances. Under that theory, a conviction today of a person performing abortions who is not a licensed physician could be set aside in a later year if it were then determined that the risks of early abortions did not warrant, after all, the physician requirement.

Finally, Maryland is left in a state of uncertainty as to its authority over the medical aspects of first trimester abortions. It is uncertain whether, for example, it may proscribe the use of an abortifacient which could cause cancer or other serious illness in the first trimester under the "greater risk than normal childbirth" test, *Roe v. Wade*, 35 L. Ed. 2d at 182, or whether its medical supervision is in all respects postponed to the second trimester. *Id.* at 183.

## CONCLUSION

Petitioner respectfully requests this Honorable Court to grant the Writ of Certiorari to resolve the conflict concerning exhaustion of state remedies; the operation of the principle of abstention in a habeas corpus proceeding; the question of retroactivity of facts and knowledge; and the role of the State in supervising the medical aspects of first trimester abortions.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
FRANCIS X. PUGH,
Assistant Attorney General
of Maryland,
Counsel for Petitioner.

# APPENDIX

*In The*
*United States District Court For The*
*District of Maryland*

*Civil No. 71-1129-Y*

*Milan M. Vuitch, M.D.,*
*Petitioner,*

*v.*

*James Brown Hardy, Acting Warden of the*
*Maryland State Penitentiary.*

## Memorandum Opinion and Order

Petitioner, Milan M. Vuitch, M.D. was convicted in the Maryland state courts of having violated Article 43 of the Maryland Code, Section 139, a misdemeanor statute; he was sentenced on November 18, 1969, to serve a term of 3 years in prison, two of which were suspended, and to pay a fine of $5,000. The statute in question prohibits, in pertinent part, the performance of therapeutic abortions except in hospitals accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene.

At the trial, after the state had completed its case in chief, petitioner's counsel filed a motion for judgment of acquittal on two grounds: (a) the state's evidence was legally insufficient, and (b) the statute was unconstitutional because it was an unwarranted discrimination against this defendant in favor of physicians in accredited and licensed hospitals, because it was unnecessarily broad, and because it invaded "the area of protected freedoms of both the pregnant woman and the defendant, a licensed physician, in the private pursuit of their lives and duty, and is without compelling state interest sufficient to justify

encroachment upon personal liberty." The trial judge denied the motion without commenting on the constitutional issue. The motion was renewed orally at the end of all the evidence, and again it was denied without comment.

Dr. Vuitch appealed to the Maryland Court of Special Appeals, which affirmed his conviction. That court held that the constitutional issues were not properly preserved for appellate review because petitioner's motion for judgment of acquittal was "not an appropriate vehicle to challenge the constitutionality, facial or otherwise, of the statute under which the criminal prosecution is initiated." *Vuitch v. State*, 10 Md. App. 389, 397, 271 A.2d 371, 376 (1970). The court said that the issue presented mixed questions of fact and constitutional law, and that such issues "are most appropriately determined upon pretrial motion and on a record there to be made which would provide the relevant evidentiary background so essential to place the constitutional questions in proper focus and perspective . . ." 10 Md. App. at 399-400, 271 A.2d at 377.

In a subsequent motion for reargument, petitioner sought a remand pursuant to Maryland Rule 1071 for full adjudication, following an evidentiary hearing, of the constitutional issues; this motion was denied by the Court of Special Appeals.

Dr. Vuitch's petitions for certiorari were denied by the Court of Appeals of Maryland and by the United States Supreme Court. Following these denials, petitioner promptly filed a petition for habeas corpus and an application for bail with this court. He has never sought relief in the Maryland courts under the Post-Conviction Procedure Act (Article 27, §645A, *et seq.*, Annotated Code of Maryland).

The application for bail was granted by this court. Respondent, the acting warden of the Maryland State Penitentiary, has now moved for dismissal of the petition for habeas corpus on the ground that petitioner has failed to exhaust his state remedies, and for denial of bail to petitioner. For the reasons hereinafter given, respondent's

motion to dismiss the petition will be denied, and its motion to have bail stricken will be granted.

I. *Exhaustion of State remedies*

Petitioner has exhausted his state remedies despite his failure to apply for relief under Maryland's Post-Conviction Procedure Act. It is well settled that when the highest court of a state has examined and passed on the same issue subsequently pressed on the federal court, then petitioner will not be required to present that issue to the state courts again by a different procedure. *Brown v. Allen*, 344 U.S. 443 (1953); *Grundler v. State of North Carolina*, 283 F.2d 798 (4th Cir. 1960); *Edmondson v. Warden, Maryland Penitentiary*, 335 F.2d 608 (4th Cir. 1964). Unless principles of comity dictate a different conclusion the federal courts should simply be satisfied that the state courts have had a clear *opportunity* to pass upon the federal constitutional issue being raised by the petition for habeas corpus. *Fay v. Noia*, 372 U.S. 391 (1963). In this case the state courts have had ample opportunity to investigate and consider petitioner's contentions.

II. *Application for Bail*

Respondent contends that petitioner's application for bail pending post-conviction adjudication should be denied because this Court's jurisdiction has not been properly invoked and because petitioner has failed to exhaust his state remedies.

The jurisdiction of this Court has been properly invoked in the present case pursuant to the inherent power of the judiciary to admit prisoners to bail and to the statutory authority of 28 U.S.C. §2243, which provides in pertinent part that "[t]he court [in a habeas corpus proceeding] shall summarily hear and determine the facts, and dispose of the matter as law and justice require." *Johnston v. Marsh*, 227 F.2d 528 (3rd Cir. 1955). See also *Brown v. Fogel*, 387 F.2d 692 (4th Cir. 1967).

This Court has already concluded that petitioner has properly exhausted his state remedies. However, the

problem of exhaustion rises in a different context regarding the issue of bail. Rule 777 (b) of the Maryland Rules of Procedure (Amended June 28, 1971, effective September 1, 1971: Annotated Code of Maryland, 1971 Cum. Supp.) provides in part that:

> *After Conviction — Pending Sentence or Appeal*
>
> After conviction, pending sentence or appeal, an accused may be admitted to bail in the discretion of the trial court. . . .

Since the language of Rule 777 (b) does not contemplate bail in post-conviction proceedings, there is no state bail remedy for petitioner to exhaust at this stage, so that no rule of comity is disturbed. *Brown v. Fogel, supra.*

Ultimately, the decision as to whether bail should be granted in post-conviction proceedings is committed to the discretion of the trial court. *Mitchell v. Schoonfield*, 285 F. Supp. 728 (D. Md. 1968). Petitioner asks this Court to exercise its discretion and admit him to bail because several factors distinguish his case from the "ordinary" case. First, he has been convicted of violating Maryland's therapeutic abortion law which has yet to be constitutionally tested. Second, petitioner doubts that his constitutional claims will be given serious consideration by the state courts. Third, he fears that his one year term of imprisonment will expire before the conclusion of PCPA proceedings. (This contention is mooted by the fact that this Court concludes that petitioner has exhausted his state remedies.) Finally, petitioner maintains that since the Attorney General has previously opposed petitioner's efforts to litigate his constitutional claims in state courts, the Attorney General should not now be permitted to argue that petitioner should remain in prison pending the exhaustion of his state remedies.

While this Court is of the opinion that it has jurisdiction to entertain an application for bail pending adjudication of petitioner's post-conviction claims and that petitioner has properly exhausted his administrative remedies, this

Court will not exercise its discretion and admit to bail petitioner Vuitch during the pendency of any post-conviction proceedings. Power is one thing and the use of it another.

This Court is not persuaded that petitioner's allegations present such exceptional circumstances as to justify an exercise of its discretion admitting petitioner to bail in the instant case. *Mitchell v. Schoonfield, supra.* However, a hearing in this Court will be scheduled at the earliest feasible time, so that if the Maryland statute is, in fact, found to be unconstitutional, petitioner may be released as soon as possible.

For the reasons stated above, it is, therefore, this 17th day of February, 1972.

ORDERED:

1. That the respondent's motion to dismiss the petition for habeas corpus be and it is hereby denied.

2. That the respondent's motion to deny petitioner's application for bail be and it is hereby granted.

3. That petitioner present to this Court at a hearing on March 17, 1972 such evidence and arguments as he wishes the Court to consider in support of his contention that the statute under which he was indicted, tried and convicted is unconstitutional.

Joseph H. Young,

United States District Judge.

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## Order

(Filed March 9, 1972)

In petitioner's appeal from the order of the district court entered February 17, 1972, revoking bail theretofore granted the court has considered petitioner's memorandum and exhibits thereto, the Warden's motion to dismiss appeal and memorandum and exhibits thereto, and the record on appeal; and, concluding that it has jurisdiction and that

there are present exceptional circumstances, the court ORDERS:

1. That a certificate of probable cause to appeal is hereby granted.

2. That the order of the district court entered February 17, 1972, revoking the bail theretofore granted, is hereby reversed.

3. That the case is remanded to the district court with directions to continue the bail theretofore granted until the case is decided on the merits and, in the event that the district court concludes to deny the writ and petitioner seeks a further appeal, until the case is heard and determined on the merits by this court, or until further order of this court.

Harrison L. Winter,
United States Circuit Judge,

J. Braxton Craven, Sr.,
United States Circuit Judge,

John D. Butzner, Jr.,
United States Circuit Judge,

A True Copy, Teste:
Samuel W. Phillips, Clerk
By Frances S. Sewell,
Deputy Clerk.

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*United States Court of Appeals*
*For The Fourth Circuit*

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*Misc. No. 917*

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*Milan M. Vuitch, M.D.,*
*Petitioner,*

*versus*

*James Brown Hardy, Acting Warden of the Maryland State Penitentiary,*
*Respondent.*

ORDER

The petition of the State of Maryland for rehearing, including a suggestion for rehearing in banc, having been read and considered, and no judge in active service having requested a poll on the suggestion for rehearing in banc, it is, with the concurrence of the panel, ORDERED, that said petition be, and it is hereby, denied.

For the Court:

/s/ HARRISON L. WINTER,
United States Circuit Judge.

A True Copy, Teste:

SAMUEL W. PHILLIPS, Clerk
By Diane Burke,
Deputy Clerk.

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## MEMORANDUM OPINION AND ORDER

*In The*
*United States District Court For The*
*District of Maryland*

*Civil No. 71-1129-Y*

*Milan M. Vuitch, M.D.,*
*Petitioner,*

*v.*

*James Brown Hardy, Acting Warden of the Maryland State Penitentiary,*
*Respondent.*

---

Milan M. Vuitch, M.D., brings this petition for habeas corpus following his conviction in the Circuit Court for Montgomery County, Maryland, for violation of Article 43, §139 of the Maryland Code Annotated. That section provides, in part, that a person is guilty of a misdemeanor if

he performs a therapeutic abortion in any facility other than "a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene. . . ." Following a trial before the Honorable Ralph G. Shure, petitioner was sentenced on November 18, 1969, to serve a term of three years in prison, two of which were suspended, and to pay a fine of $5,000. Petitioner sought unsuccessfully to raise the issue of the constitutionality of the statute in the state courts, and this Court, having previously determined that petitioner has sufficiently exhausted his state court remedies,[1] now turns to a consideration of that issue.

## I.

At the outset, in the interest of more clearly delineating the constitutional question presented, certain issues which are not relevant to the present inquiry should be emphasized.

First, the reasons for which a woman is statutorily permitted to seek an abortion[2] are not relevant here, and this

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[1] Order filed February 17, 1972.

[2] No criminal penalties are provided for violation of Article 43, §137, of the Maryland Code ("conditions under which termination of pregnancy permitted; records and reports.") The Maryland statute thus appears to be distinguishable from those involved in the cases cited at note 3, *infra*.
Section 137 provides:

> (a) No person shall terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by the State of Maryland may terminate a human pregnancy or aid or assist or attempt a termination of a human pregnancy if said termination takes place in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene and if one or more of the following conditions exist:
>
> (1) Continuation of the pregnancy is likely to result in the death of the mother;
>
> (2) There is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;
>
> (3) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;

**Court expresses no opinion as to the constitutionality of the statutory limitations on those reasons.[3] Neither is the statutory protection in §138 of hospitals and medical personnel from civil liability for refusal to perform an abortion at issue here.**

---

(4) The pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur.

(b) In no event shall any physician terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth unless all of the following conditions exist:

(1) Not more than twenty-six weeks of gestation have passed (except in the case of a termination pursuant to subsection (a)(1) or where the fetus is dead);

(2) Authorization therefor has been granted in writing by a hospital abortion review authority appointed by the hospital.

(c) The hospital abortion review authority shall keep written records of all requests for authorization and its action thereon. An annual report of the therapeutic abortions performed in Maryland shall be made by the director of the hospital and its governing board. Such reports shall include the number of requests, authorizations and performances, the grounds upon which such authorizations were granted, and the procedures employed to cause the abortions and such reports shall be forwarded to the joint commission on accreditation of hospitals and the State Board of Health and Mental Hygiene for the purpose of insuring that adequate and proper procedures are being followed in accredited hospitals. Such information, which is not subject to the physician-patient privilege, may be made available to the public. Said reports shall not include the names of the patients aborted.

[3] Compare, e.g., *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Texas 1970); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970); *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971); *United States v. Vuitch*, 402 U.S. 62 (1971); *Y.W.C.A. v. Kugler*, ___ F. Supp. ___ (D. N.J. Feb. 1972); *Abele v. Markle*, ___ F. Supp. ___ (D. Conn. Apr. 1972), which held statutory limitations on the reasons for which a woman might obtain an abortion invalid. Cf. *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970); *State v. Abodeely*, 179 N.W.2d 347 (Iowa, 1970); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio, 1970); *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D. N.C. 1971), which upheld such statutory limitations.

Second, the propriety or wisdom of petitioner's conduct in this particular case should not be relevant to a determination of the validity of the statute under which he was indicted and convicted. The Court has found nothing in the record that clearly precludes the possibility that at the time of the arrest Dr. Vuitch was in fact operating an "abortion mill," and if that were the case, his practices would surely deserve our strongest censure. However, that possibility is not controlling here, nor is the fact that Dr. Vuitch did not attempt in this case to perform the abortion in a licensed, accredited hospital, for if the statute under which he was indicted and convicted is unconstitutional on its face then the petition for habeas corpus must be granted. See *Eisenstadt v. Baird*, U.S. , 31 L. Ed. 2d 349, 92 S. Ct. 1029 (March 22, 1972).[4]

Petitioner argues that a woman has a constitutionally protected "fundamental personal right" to seek an abortion, that any restriction by the State of that right must, therefore, be supported by a "compelling state interest" and must also be shown to be necessary in that there are no other reasonable alternatives open to the State which would promote that interest and which would entail less of a burden on the woman's exercise of her rights. Petitioner argues that a less restrictive and still reasonable alternative to the hospitalization requirement embodied in Article 43, §139, is in fact available to the State — i.e. restricting the performance of abortions to specially licensed facilities in addition to hospitals. Petitioner has supported his argument with numerous affidavits and exhibits which tend to show that there is wide-spread agreement among the medical profession that hospitalization is not generally necessary for performance of abortions in the first trimester of pregnancy,[5] that state-regulated clinics which perform abortions have been found to be safe

[4] The *Eisenstadt* decision, and its predecessor *Griswold v. Connecticut*, 381 U.S. 479 (1965), also establish that petitioner has standing here to assert the constitutional rights of his patients and potential patients.

[5] See, e.g., Petitioner's affidavits 1-4, 10-15.

and easily regulated in other states;[6] and that many Maryland women have been induced to seek abortions in other states because of the costs and scheduling delays attendant upon the requirement that abortions in Maryland be performed in licensed, accredited hospitals.[7]

The State implicitly denies that a woman has a "fundamental personal right" to seek an abortion by basing its arguments on the existence of a "reasonable basis" for the legislative determination that abortions should only be performed in licensed, accredited hospitals. In support of this argument the State also has submitted affidavits and exhibits, which tend to show that a number of leading specialists in obstetrics and gynecology feels that abortions should be performed in hospitals because of the possibility of complications,[8] that abortions in Maryland have been at least as accessible to non-private patients as to private patients,[9] and that only two hospitals in the State which provide obstetrical and gynecological services are not accredited by the Joint Commission on Accreditation of Hospitals.[10]

If a woman does not have a "fundamental personal right" to seek an abortion, then the requirement that the abortions be performed in a hospital might be upheld; the State's interest in protecting the woman from the possibility, however remote, of complications following abortion probably satisfies the minimal requirements of a "reasonable basis" for the legislation.[11] *Dandridge v. Wil-*

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[6] Petitioner's affidavits 2, 8, 10-15.
[7] Petitioner's affidavits 5, 6.
[8] Respondent's affidavits 1, 3, 4, 6, 7, 8, 17.
[9] Respondent's affidavit 4.
[10] Respondent's affidavit 5.
[11] The Court would have considerably more difficulty in finding a "reasonable basis" for that portion of the statutory requirement that demands that abortions be performed in a hospital that has been accredited by the Joint Commission on Accreditation of Hospitals. In the first place, the affidavit (No. 9) of the member of the Joint Commission, submitted by petitioner, establishes that accreditation by the Commission is granted or withheld entirely without regard to the particular hospital's policy on abortions, and this is not contradicted by the State. In the second place, if the high level

*liams*, 397 U.S. 471 (1970). However, this Court is convinced that a woman does have a constitutionally protected, "fundamental personal right" to seek an abortion. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird, supra*, 31 L. Ed. 2d 349, 362, 92 S. Ct. 1029, 1038. (Emphasis deleted.) Our inquiry, therefore, turns to the questions of whether Maryland has a "compelling state interest" which is being promoted by the hospitalization requirement and whether no "other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity," *Dunn v. Blumstein*, U.S. , 31 L. Ed. 2d 274, 285, 92 S. Ct. 996, 1003 (March 21, 1972), are open to the State.

## III.

Ordinarily the first possible "compelling state interest" which comes to mind in connection with abortion legislation is the protection of the rights of the fetus. However, in this case it is unnecessary to decide whether this interest is sufficiently compelling to justify the statutory limitation on constitutionally protected activity, for it is clear that that interest is not being promoted by the statu-

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of safety and competence which may be inferred from the fact of accreditation forms the "reasonable basis" for the legislation, it is hard to understand how the State can justify sanctioning the existence of *any* unaccredited hospital in the State, in view of the undisputed fact that almost all other surgical procedures present a greater mortality and morbidity risk to the patient. If a woman were held not to have a fundamental personal right to seek an abortion, this lack of a "reasonable basis" for the accreditation requirement would constitute an alternative ground for granting the petition since the accreditation requirement is an integral part of the statute under which Dr. Vuitch was convicted. However, in view of the Court's belief that the existence of a "reasonable basis" for the statutory requirement will not suffice to support its validity, it is not necessary to decide this point.

tory provision under consideration; the fetus cannot be said to have an interest in being aborted in a hospital rather than elsewhere.

On the other hand, protection of the health of its citizens has always been considered to be a strong state interest, e.g., *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908); *Prince v. Massachusetts*, 321 U.S. 158 (1944), and there is clearly a rational connection between that interest and the hospitalization requirement which is being attacked here. Abortion is a surgical procedure and obviously affects the patient's health. However, the Court believes that reasonable alternatives have been shown to exist which would entail less of a burden on the exercise of constitutional rights.

As Justice Marshall said in the recent case of *Dunn v. Blumstein, supra:*

> "Statutes affecting constitutional rights must be drawn with 'precision,' . . . and must be 'tailored' to serve their legitimate objectives, . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' . . ."

Petitioner has shown, and this Court finds as a fact, that the requirement that abortions be performed only in licensed, accredited hospitals does place some burden on Maryland women's rights to seek an abortion, that that burden would be lightened by permitting abortions to be performed in other facilities as well, and that the experience of other states has proved that, with appropriate regulation, facilities other than hospitals can and do protect the health of the women seeking an abortion as adequately as hospitals do. The Court believes that regulation of these alternative facilities is perfectly feasible; the affidavit of Dr. Seegar, the Chief of the Maternity and Family Planning Section, Division of Maternal and Child Health, Maryland State Department of Health and Men-

tal Hygiene, is particularly persuasive.[12] Indeed, it has also been pointed out that specialized abortion facilities might be more susceptible to regulation than hospitals in their abortion practices, for not only would such facilities' abortion practices be more visible, but the State might also be less hesitant to revoke such a facility's license than to revoke a hospital's license. A wide variety of alternatives are open to the State in protecting the health of the woman seeking abortion. Simply by way of illustration: it may require licensure by clinics and conformity by those clinics to administrative regulations as a condition of licensure, it may permit the medical profession to make a free decision as to hospital, clinic or office for performance of abortions in each particular case, as it now does with regard to other types of patients and procedures; it may require that only specialists in obstetrics and gynecology perform abortions, or it may allow any licensed practitioner to perform them, or even specially-trained para-medical personnel under appropriate supervision; it may require that abortions only be performed in facilities which have a "back-up" arrangement with a nearby hospital in case of complications, as is apparently a requirement in other states;[13] it may require that the doctor or doctors who use the facility have staff privileges at the back-up hospital so as to preserve continuity of pa-

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[12] Petitioner's affidavit No. 7, p. 3, para. 6-7:

"It is my opinion that the State Department of Health and Mental Hygiene is fully capable of establishing and administering regulations less restrictive than mandatory hospitalization for licensed non-hospital facilities, located near hospitals, which could provide safe and less expensive first trimester pregnancy termination.

". . . Administratively, there appears to me to be no reason why an adequate non-hospital licensed facility cannot be regulated as well as a hospital insofar as a therapeutic abortion program is concerned. In both cases the same types of forms for statistical purposes can be utilized, filled out by attending physician and assistants, and designed to ensure compliance with the law."

[13] E.G. New York, Washington; the Court is particularly impressed with the Washington State Board of Health's regulations found at pp. 17-22 of Petitioner's Exhibit D.

tient care.[14] These alternatives, which have in many cases been shown by experience to be feasible, would surely involve less of a burden on the exercise of a woman's right to seek an abortion, for it is impossible to doubt that it is far easier to establish a clinic or other facility limited to one specialized procedure than to establish an entire hospital, and the greater the number of adequate facilities available the smaller the burden on the exercise of the right. And it may be possible for the state to put many of the controls into effect by regulation of the Department of Health and Mental Hygiene, without the necessity of further legislative action.

There is one other possible "compelling state interest" which should be discussed, although the State has not suggested it: Maryland may have a legitimate interest in regulating the conduct of medical practitioners who perform abortions. It is common knowledge that, at least prior to the 1968 revision of Maryland's abortion laws, abortions were, occasionally or frequently, performed, illegally, by persons of questionable competence and under questionable hygenic conditions. It may be that some Maryland women, perhaps under the impression that anonymity will be better preserved, seek out certain of these practitioners who may charge very high fees for their alleged services; at least Maryland would be justified in taking some measures in response to that possibility. If control of medical practitioners who perform abortions were the "compelling state interest" which the statute was designed to promote, then the accreditation requirement also could be justified as promoting that interest, since the exhibits submitted in the case show that the quality and frequency of peer review is one of the criteria by which the Joint Commission makes it decisions on accreditation.

But here again the requirement that there be no other reasonable method of promoting the State's interest which

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[14] This enumeration of alternatives is in no way intended to be exhaustive, and this Court expresses no opinion as to the wisdom or constitutionality of any particular alternative.

involves less of a burden on constitutionally protected activity cannot be met. Maryland already has a strong statute, Article 43, §130, Annotated Code of Maryland, regulating the professional conduct of physicians; it empowers the Commission on Medical Discipline, part of the State's Department of Health and Mental Hygiene, to take action against a physician for any one of nineteen reasons, including willful misrepresentation in treatments, gross, willful and continued overcharging for professional services, willful omission to file reports required by law, and professional incompetency. In regulations governing licensed facilities, or even by statutory provision, the State may set maximum fees for termination of pregnancy or take such other steps as it deems necessary to protect against the legacy of illegal abortions. And if the state wishes to guard against the performing of abortions by non-medical practitioners, it may prosecute such people for practicing medicine without a license. See, *e.g.*, *Rock v. State*, 6 Md. App. 618 (1969).[15]

## IV.

Various arguments presented by the State remain to be considered.

It is argued that, although the medical profession may now be in substantial agreement on the safety of clinical abortions in the first trimester of pregnancy, no such agreement existed in 1968 when Dr. Vuitch performed the abortion which was the basis for his prosecution, and that, therefore, the use of 1972 statistics constitutes some sort of "bootstrap" argument. The State's argument mistakes the nature of the Great Writ, for it is not alleged that clinical abortions actually were unsafe in 1968 — only that the medical profession had not at that time recognized their safety. It would be manifestly unfair to require Dr. Vuitch to serve a prison term solely because he may have recognized a fact which many of his colleagues had not.

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[15] One court, at least, has also suggested that the State may prosecute those who perform abortions under the common law, which made it a crime to perform an abortion on a woman who was more than three months pregnant. *Y.W.C.A. v. Kuglar*, *supra*.

The State contends that the decision on the proper location for performance of abortions is a matter of judgment, that its medical affidavits show that the decision to restrict the proper location to licensed, accredited hospitals is not an unreasonable judgment, and that the most appropriate institution to make that judgment is the legislature and not the court. The short answer to this argument is that Federal constitutional rights are involved, and that Federal Courts have an affirmative duty to make independent judgments in such cases. By making an independent judgment in this case as to the Federal constitutional rights, the Court intends to leave the medical profession and the legislature free to exercise their judgment in their respective fields of expertise.

It is also argued by the State that this Court should abstain from a decision in this case because another prosecution against Dr. Vuitch is currently pending in the state courts in which Dr. Vuitch has raised, this time in proper form, the same constitutional issues as are presented here. However, the doctrine of abstention is inappropriate in this case. Federal courts will abstain from deciding a dispute when it could be resolved by determination of a previously undetermined point of state law; they will not abstain when the undetermined issue is solely one of Federal constitutional rights. The state statute in this case, although largely uninterpreted by the state courts, is quite unambiguous, and the only issue raised is its constitutionality. In such cases the Federal courts have a positive duty not to abstain. *Baggett v. Bullitt*, 377 U.S. 360 (1964).

Finally, the State argues that there is no showing that any Maryland woman has been absolutely unable to obtain an abortion in Maryland. But no such showing is necessary. As the Supreme Court noted recently in *Dunn v. Blumstein*, *supra*, it is not necessary to show that the legislation actually and totally deterred the exercise of a constitutional right; it is enough that the legislation is shown to have placed an unnecessary burden on the exercise of the right, and that showing has been made here. The validity of Article 43, §139, cannot be upheld in the face of such a showing.

Therefore, it is this 22nd day of June, 1972, by the United States District Court for the District of Maryland, ORDERED:

1. That the petition for a writ of habeas corpus be and it is hereby granted; and

2. That the Clerk mail a copy of this Memorandum Opinion and Order to petitioner; to Roy Lucas, attorney for petitioner, and to Francis X. Pugh, Assistant Attorney General of the State of Maryland.

JOSEPH H. YOUNG,
United States District Judge.

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*United States Court of Appeals*
*For The Fourth Circuit*

PER CURIAM:

The district court held that petitioner had exhausted his available state remedies prior to filing an application for a writ of habeas corpus and that the writ should issue because the Maryland Therapeutic Abortion Act, 4B Ann. Code of Maryland, Art. 43, §§ 137 et seq. (1971 Rpl. Vol.), under which petitioner was convicted, was unconstitutional, because of the limitations which it placed upon the performance of an abortion. We agree that petitioner had exhausted his available state remedies. Subsequent to the argument before us, the Supreme Court decided *Roe v. Wade*, ..... U.S. ....., 41 L.W. 4213 (January 22, 1973) and *Doe v. Bolton*, ..... U.S. ....., 41 L.W. 4233 (January 22, 1973). These cases make clear that the district court correctly decided the case, and we affirm on their authority.

AFFIRMED.

Annotated Code of Maryland
1970 Cumulative Supplement

Article 43

Abortion

§ 137. Conditions under which termination of pregnancy permitted; records and reports.

(a) No person shall terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by the State of Maryland may terminate a human pregnancy or aid or assist or attempt a termination of a human pregnancy if said termination takes place in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene and if one or more of the following conditions exist:

(1) Continuation of the pregnancy is likely to result in the death of the mother;

(2) There is substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;

(3) There is substantial risk of the birth of the child with grave and permanent physicial deformity or mental retardation;

(4) The pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur.

(b) In no event shall any physician terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth unless all of the following conditions exist:

(1) Not more than twenty-six weeks of gestation have passed (except in the case of a termination pursuant of subsection (a) (1) or where the fetus is dead); and

(2) Authorization therefor has been granted in writing by a hospital abortion review authority appointed by the hospital.

(c) The hospital abortion review authority shall keep written records of all requests for authorization and its action thereof. An annual report of the therapeutic abortions performed in Maryland shall be made by the director of the hospital and its governing board. Such reports shall include the number of requests, authorizations and performances, the grounds upon which such authorizations were granted, and the procedures employed to cause the abortions and such reports shall be forwarded to the joint commission on accreditation of hospitals and the State Board of Health and Mental Hygiene for the purpose of insuring that adequate and proper procedures are being followed in accredited hospitals. Such information which is not subject to the physician-patient privilege, may be made available to the public. Said reports shall not include the names of the patients aborted. (1968, ch. 470, §2; 1970, ch. 736.)

§ 138. Refusal to perform or participate in or submit to abortion; refusal of hospital to permit.

(a) No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person nor a basis for any disciplinary or any other recriminatory action against him.

(b) No hospital, hospital director or governing board shall be required to permit the termination of human pregnancies within its institution and the refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against it by the State or any person.

(c) The refusal of any person to submit to an abortion or to give consent therefor shall not be grounds for loss of any privileges or immunities to which such person would otherwise be entitled nor shall submission to an abortion or the granting of consent therefor be a condition precedent to the receipt of any public benefits. (1968, ch. 470, §2; 1970, ch. 736.)

§ 139. Unlawful acts.

(a) A person is guilty of a misdemeanor if he

(1) Sells or gives, or causes to be sold or given, any drug, medicine, preparation, instrument, or device for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by a licensed physician in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene; or

(2) Gives advice, counsel, or information for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by such physician in such a hospital; or

(3) Knowingly assists or causes by any means whatsoever the obtaining or performing of a termination of human pregnancy other than by such physician in such a hospital.

(b) Any person who violates any provision of this section, upon conviction, is subject to a fine of not more than five thousand dollars for each offense, or to imprisonment for not more than three years, or both such fine and imprisonment. The penalties in this section are in addition to and not in substitution for any other penalty or penalties applicable to particular classes of persons under other laws of this State. (1968, ch. 470, § 2; 1970, ch. 736.)

Maryland Rule of Procedure 725:

a. *Pleadings.*

Pleadings in a criminal proceeding shall be the indictment, the information, or the warrant where a jury trial

was prayed before a trial magistrate or an appeal has been taken from a trial magistrate; the pleas of not guilty, not guilty by reason of insanity as provided by statute, guilty, or *nolo contendere;* the motion to dismiss, and the motion to grant appropriate relief. All other pleas, demurrers and motions to quash are abolished and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised by the motion to dismiss or to grant appropriate relief.

b. *Defenses and Objections Before Trial.*

Defenses and objections based on defects in the institution of the prosecution or in the indictment, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion before trial. Such motion shall include all such defenses and objections then available to the accused. Failure to present any such defense or objection as herein provided shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment to charge an offense shall be noticed by the court at any time during the proceeding. Any defense or objection capable of determination without the trial of the general issue may be raised before trial by motion.

(Uniform Rule 25 & Rule 725.)

c. *Motion.*

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

(Rule 725 b 5.)

d. *Hearing on Motion.*

A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general

issue. All issues of fact raised by such motion may be determined by the court without a jury or affidavit or in such other manner as the court may direct.

(Uniform Rule 25 & Rule 725.)

e. *Effect of Determination.*

If a motion is determined adversely to the accused he may plead. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment, it may order that the accused be held in custody, or that his bail be continued for a specified time pending the filing of a new indictment. (Uniform Rule 25 & G.R.P.P. Pt. Four, I, Rule 3; Rule 725.)

f. *Exceptions.*

Exceptions shall be governed by the provision of Rules 522 (Objections to Ruling or Order — Method of Making), 510 (Reservation of Points for Court *In Banc*), and 564 b 3 (Trial by Court — No Instructions, Objections or Exceptions).

Maryland Rule of Procedure 755:

a. *Supersedes Motion for Directed Verdict.*

The motion for a directed verdict of not guilty and the motion for an instruction that the evidence is insufficient in law to sustain a conviction are abolished and the motion for judgment of acquittal shall be used in their place.

(Cf. Rule 738, G.R.P.P. Pt. Four, I, Rule 5A, & Uniform Rule 38.)

b. *When Made.*

A motion for judgment of acquittal on one or more counts, or one or more degrees of an offense, may be made by an accused at the close of the evidence offered by the State, or may be made at the close of all the evidence, whether or not such motion was made at the close of the evidence offered by the State. If the motion is not granted at the close of the evidence offered by the State, the ac-

cused may offer evidence without having reserved the right to do so, but by so doing, he withdraws his motion.

(Uniform Rule 38 & Rules 3, 738, 741; G.R.P.P. Pt. Four, I, Rules 5A, 7.)

Cross references. — See Code, article 27, § 593 (Jury to be judges of law and fact; motion for judgment of acquittal on ground of insufficiency of evidence). See also Md. Const., article XV, § 5.

c. *Action by Court.*

If the court on such motion or on its own motion determines that a judgment of acquittal should be granted, it shall direct the clerk to enter a judgment of acquittal on one or more counts, or one or more degrees of an offense which by law is divided into degrees, and to note that it has been entered by the direction of the court. If the case is tried before a jury it shall not be necessary for the jury by its foreman, or otherwise, to render a verdict.

POST CONVICTION PROCEDURE

§ 645A. Right of appeal of convicted persons.

(a) *Right to institute proceedings to set aside or correct sentence.* — Any person convicted of a crime and either incarcerated under sentence of death or imprisonment or on parole or probation, including any person confined or on parole or probation as a result of a proceeding before a trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) or a proceeding under Article 31B of the Code, title "Defective Delinquents," who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court or trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error

which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, may institute a proceeding under this subtitle to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any other proceeding, that the petitioner has taken to secure relief from his conviction.

(b) *When allegation of error deemed to be finally litigated.* — For the purposes of this subtitle, an allegation of error shall be deemed to be finally litigated when the Court of Appeals or Court of Special Appeals has rendered a decision on the merits thereof, either upon direct appeal or upon any consideration of an application for leave to appeal filed pursuant to § 645-I of this subtitle; or when a court of original jurisdiction, after a full and fair hearing, has rendered a decision on the merits thereof upon a petition for a writ of habeas corpus or a writ of error coram nobis, unless said decision upon the merits of such petition is clearly erroneous.

(c) *When allegation or error deemed to have been waived.* — For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, unless the failure to make such allegation shall be excused because of special circumstances. The burden of proving the existence of such special circumstances shall be upon the petitioner.

When an allegation of error could have been made by a petitioner before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or corum nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by

said petitioner, but was not in fact so made, there shall be a rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation.

(d) *Decision that Constitution imposes standard not theretofore recognized.* — For the purposes of this subtitle and notwithstanding any other provision hereof, no allegation of error shall be deemed to have been finally litigated or waived where, subsequent to any decision upon the merits thereof or subsequent to any proceeding in which said allegation otherwise may have been waived, any court whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or of Maryland imposes upon State criminal proceedings a procedural or substantive standard not theretofore recognized, which such standard is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence.

(e) *Not substitute for remedies incident to trial proceedings; time of filing petition for relief; other common-law and statutory remedies superseded.* — The remedy herein provided is not a substitute for, nor does it affect any remedies which are incident to the proceedings in the trial court or before the trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) or any remedy of direct review of the sentence or conviction. A petition for relief under this subtitle may be filed at any time, except that where an appeal has been taken from the judgment of conviction to the Court of Appeals or Court of Special Appeals, it shall not be necessary to appoint counsel or conduct a hearing or take any action whatsoever on the petition, until the judgment of conviction becomes final in the court to which the appeal was taken. No appeals to the Court of Appeals of Maryland or the Court of Special Appeals in habeas corpus or corum nobis cases, or from other common-law or statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained, except appeals in such cases pending in the Court of Appeals on June 1, 1958, shall be processed in due

course. Provided, however, that nothing in this subtitle shall operate to bar an appeal to the Court of Special Appeals (1) in a habeas corpus proceeding instituted under § 25 of Article 41 of this Code or (2) in any other proceeding in which a writ of habeas corpus is sought for any purpose other than to challenge the legality of a conviction of a crime or sentence of death or imprisonment therefor, including confinement as a result of a proceeding under Article 31B of this Code. (1958, ch. 44; 1959, ch. 429; 1965, ch. 442, § 1; 1966, ch. 12, § 4; 1970, ch. 99, § 4; ch. 595.)

* * * * * *

§ 645E. Same — Payment of costs by political subdivision.

If after judgment, a review is sought by the petitioner within thirty (30) days and the Court of Appeals or the Court of Special Appeals grants leave to appeal pursuant to § 645-I of this article and either of said courts finds that the petitioner is unable to pay the costs of the review, said courts shall order that all necessary costs and expenses incident thereto, including all court costs, stenographic services, and printing, be paid by the political subdivision in which the judgment is rendered. (1958, ch. 44; 1962, ch. 36, § 22; 1966, ch. 12, § 4.)

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§ 645-I. Application for appeal of final order; appeal procedure; affirmation, reversal, etc., of order.

Any person, including the Attorney General of Maryland or the State's attorney for Baltimore City or any county, as the case may be, aggrieved by the order of the court or judge passed in accordance with this subtitle, may within thirty (30) days after the passage of said order apply to the Court of Appeals of Maryland for leave to prosecute an appeal therefrom in cases where the applicant is incarcerated under sentence of death, and may within thirty (30) days after the passage of said order apply to the Court of Special Appeals for leave to prosecute an appeal therefrom in all other cases. Said application for leave to prosecute an appeal shall be in such form as said appellate courts may, by their rules, prescribe, and in the event that

the Attorney General or the State's attorney shall forthwith state his intention to file such application for an appeal, the order may be stayed, but the judge may, in his discretion, admit the petitioner to bail for his appearance when required. If the application to prosecute such appeal shall be granted, the procedure thereafter shall be in conformity with the rules of said appellate courts and the courts may affirm, reverse or modify the order appealed from, or they may remand the case for further proceedings, but if said application is denied, the order sought to be reviewed shall thereby become final. (1958, ch. 44; 1966, ch. 12, § 4.)

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MICHAEL RODAK, J

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

**No. 72-1542**

JAMES BROWN HARDY, Acting Warden of the Maryland State Penitentiary,

*Petitioner,*

—v.—

MILAN M. VUITCH, M.D.,

*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1972

**No. 72-1542**

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JAMES BROWN HARDY, Acting Warden of the Maryland State Penitentiary,

*Petitioner,*

—v.—

MILAN M. VUITCH, M.D.,

*Respondent.*

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## BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Milan M. Vuitch, M.D., respectfully submits this brief in opposition to the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, upon the grounds that the questions presented are rendered insubstantial by the decisions of this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), which should be held fully retrospective.

### Citation to Opinion Below

The decision below has now been officially reported as *Hardy* v. *Vuitch*, 473 F.2d 1370 (4th Cir. 1973) (per curiam).

## Questions Presented

I.

Whether the U.S. Court of Appeals correctly applied *Roe* v. *Wade* and *Doe* v. *Bolton* retroactively in this federal habeas corpus proceeding where conduct previously classified as criminal was held to be a matter of constitutional right and no legitimate state interest would be served by a ruling of nonretroactivity?

II.

Whether the U.S. Court of Appeals and District Court correctly held that Respondent fully exhausted state remedies before seeking a writ of federal habeas corpus by attempting three times at trial and three times on direct appeal to adjudicate his claims that the Maryland Therapeutic Abortion Act was unconstitutional?

III.

Whether the U.S. Court of Appeals and District Court correctly held that Abstention was inappropriate where no state law questions were involved and no relief was sought against a pending state court prosecution?

## Statement of the Case

Dr. Milan M. Vuitch is duly licensed to practice medicine and surgery in the States of Maryland and New York, and the District of Columbia. He practices in the District where he is Medical Director of Laurel Clinic, Inc., and President of Laurel Hospital, Inc. Dr. Vuitch is a member of the

District of Columbia Medical Society and American Medical Association. He resides in Silver Spring, Maryland, with his wife and three sons. His medical training and extensive surgical experience are detailed in the Record.

In July, 1969, Dr. Vuitch was tried on the charge of having violated Md. Code Ann., art. 43, §139, by performing a therapeutic abortion in a location which was not a general community hospital licensed by the State and accredited by the private, out-of-state agency known as the Joint Commission on Accreditation of Hospitals.[1] There was no charge, nor any basis for charging, that Dr. Vuitch had other than excellent surgical qualifications, or that his medical facility was not well-equipped. There was no allegation nor evidence of malpractice, nor any other suggestion of impropriety. There was no evidence that the alleged patient could have secured a therapeutic abortion within her means and without substantial delay at a hospital. Neither the alleged patient nor her companion was charged with an offense. No Maryland law requires that any other medical procedure, regardless of complexity, be performed in a given type of clinical or hospital facility.

The trial led to a conviction, which was sustained throughout the Maryland appellate process, after which Dr. Vuitch sought and obtained a federal writ of habeas corpus upon the ground that the convicting statute was unconstitutional. *Vuitch* v. *Hardy*, Civ. No. 71-1129-Y (D. Md. June 1972) (unreported). The Fourth Circuit, relying on *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), affirmed per curiam, 473 F.2d 1370 (4th Cir. 1973).

[1] These restrictions were categorically invalidated in *Doe* v. *Bolton*, 410 U.S. 179 (1973).

The Petition for Certiorari omits the fact that the State trial court (Circuit Court for Montgomery County) expressly considered and rejected Dr. Vuitch's federal constitutional claims. As shall appear there has also been every opportunity for the State appellate courts to rule upon the merits.

## Reasons for Denying the Writ

Each of the three questions raised by the petition for writ of certiorari is so plainly insubstantial as not to justify review by this Court. *Roe* v. *Wade* and *Doe* v. *Bolton* should be held fully retroactive. Respondent fully exhausted state court remedies before seeking federal habeas corpus. The doctrine of abstention is not applicable to a federal habeas corpus case such as this.

### I.

**The U.S. Court of Appeals correctly applied *Roe* v. *Wade* and *Doe* v. *Bolton* retroactively in this federal habeas corpus proceeding where conduct previously classified as criminal was held to be a matter of constitutional right and no legitimate state interest would be served by a ruling of nonretroactivity.**

The Petition for Certiorari does not seem to question the inevitable applicability of *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), to the underlying merits.

The statutory provision at issue in Maryland is substantially the same as that invalidated in the Georgia case of *Doe* v. *Bolton, supra.* Compared side-by-side the two statutes read in pertinent part as follows:

| *Maryland* | *Georgia* |
| --- | --- |
| [Abortion is unlawful unless performed] | |
| . . . in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene. . . . [Md. Code Ann. art. 43, §137] | . . . in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals. [Ga. Crim. Code §26-1202 (b) (4), cited in *Doe* v. *Bolton, supra*, 410 U.S. at ——]. |

As can be readily seen, these provisions are virtually identical, both having been derived from the Model Penal Code §230.3. Indeed, this Court explicitly categorized the Maryland abortion law as a "form of the ALI statute." *Roe* v. *Wade, supra*, 410 U.S. at —— n. 37; *Doe* v. *Bolton, supra*, 410 U.S. at —— n. 3, —— n. 15.

However, the Petition correctly observes that retrospective application of *Roe* and *Doe* was not there at issue. Both cases are silent on the point, and it is squarely presented here. Hundreds of physicians with previously "final" abortion convictions and/or delicensures, therefore, could be affected by a disposition of this appeal on the merits.

Nonetheless, the judgment below, necessarily holding *Roe* and *Doe* fully retroactive, is so clearly correct as not to require briefing or argument. On grounds that *Roe* and *Doe* hold certain conduct in the practice of medicine to have been a matter of constitutional right *ab initio*, the decision of the lower courts could properly be affirmed per curiam.

The rules of *Roe* and *Doe* do not even enunciate novel constitutional doctrine, but simply apply settled constitutional principles dating back to the very origins of the Bill of Rights and Fourteenth Amendment. No prior case[2] had decided the constitutional questions presented in *Roe* or *Doe*. However, as stated in *Roe:*

> in a line of decisions . . . going back perhaps as far as *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution [*Roe* v. *Wade, supra,* 410 U.S. at ——].

On this view of *Roe* and *Doe* the cases obviously are fully retroactive in application if, indeed, "retroactivity" is even an issue.

Viewing the case as one in which principles of retroactivity are determinative, the judgment below is also correct. As Mr. Justice Holmes declared in *Kuhn* v. *Fairmont Coal Co.*,[3] "[j]udicial decisions have had retrospective operation for near a thousand years." Holmes' 1910 dissent drew from the classic statement in *Norton* v. *Shelby County*[4] that

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[2] The first case remotely related to abortion was *Hawker* v. *New York,* 170 U.S. 189 (1898), which upheld retroactive delicensure of a physician who had been convicted of illegal abortion prior to passage of the licensing statute. *Roe* necessarily overrules *Hawker,* although the latter was never brought to the Court's attention in any of the briefs.

[3] 215 U.S. 349, 372 (1910) (dissenting opinion).

[4] 118 U.S. 425, 442 (1886).

> [a]n unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Mr. Justice Harlan, dissenting from a decision of nonretroactivity in *Desist* v. *United States*,[5] pointed out that federal habeas corpus relief had always been allowed "when the habeas petitioner attacked the constitutionality of the state statute under which he had been convicted . . . since . . . the State had no power to proscribe the conduct for which the petitioner was imprisoned."[6] Reliance was placed on *Ex parte Siebold*,[7] where Mr. Justice Bradley stated:

> An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment. . . . [T]he judgment may be final, in the sense that there may be no means of reversing it. But . . . the question of the court's authority to try and imprison the party may be reviewed on habeas corpus. . . . [I]f the laws are unconstitutional and void, the circuit court acquired no jurisdiction. . . .[8]

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[5] 394 U.S. 244 (1969). *Desist* declined to apply *Katz* v. *United States*, 389 U.S. 347 (1967), to invalidate introducton before December 18, 1967, of evidence from nonpenetrative electronic surveillance.

[6] 394 U.S. at 261 n. 2.

[7] 100 U.S. 371 (1880). *Siebold* held that the Supreme Court had plenary appellate habeas corpus jurisdiction to review the judgment of a lower United States court wherein appellants contested an Act of Congress as unconstitutional.

[8] 100 U.S. at 376-77.

While the Court since *Linkletter* v. *Walker*[9] has receded from any absolute rule of retrospective operation, the present case is of the classic variety which justifies application of that rule.

Here, as in *Robinson* v. *Neil*,[10] the Court is asked by Respondent to apply the decisions of *Roe* and *Doe* "to prevent a trial from taking place at all, rather than to prescribe procedural rules which govern the conduct of a trial." Far more than "the very integrity of the fact-finding process"[11] is at stake. This Court has held in *Roe* and *Doe* that the alleged conduct of Dr. Vuitch is no crime at all. To set an arbitrary point in time at which the medical practice of abortion went from constitutionally privileged to criminal would serve none of the objectives underlying *Linkletter* and similar decisions. Particularly is this the case since Dr. Vuitch sought direct review by certiorari in this Court, which was denied, 404 U.S. 868, making his state conviction final. Had certiorari been granted and the case decided with *Doe* v. *Bolton*, *supra*, there would have been no need for post conviction proceedings and a decision on the retroactivity point.

Rather, the Court should apply decisions in line with *Norton* v. *Shelby County*, and *Robinson* v. *Neil*, *supra*. Examples are numerous.

The holding in *Walker* v. *Georgia*, 409 U.S. —— (1972), that the death penalty case, *Furman* v. *Georgia*, 408 U.S.

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[9] 381 U.S. 618 (1965), giving prospective application only to *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

[10] 410 U.S. ——, —— (1973). *Robinson* applied *Waller* v. *Florida*, 397 U.S. 387 (1970), retroactively, for a unanimous Court.

[11] *Linkletter*, *supra*, 381 U.S. at 639.

238 (1972), is retroactive applies *a fortiori* here where not only the sentence but punishment of the conduct was constitutionally impermissible. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), itself a federal habeas corpus case, applied the right to counsel retroactively. More important than any procedural right, however, is the right not to be punished at all for conduct which is protected by the Constitution. Of similar import are *Eskridge* v. *Washington,* 357 U.S. 214 (1958) (per curiam), and *Reck* v. *Pate,* 367 U.S. 433 (1961), overturning, respectively, *1935* and *1936* convictions based on retroactive application of "new" constitutional rules.[12] Dr. Vuitch's *1969* conviction for conduct now held to have been privileged deserves similar treatment. In fact, four federal and one State court decision already hold by necessary implication that *Roe* and *Doe* are fully retroactive.[13] No decisions to the contrary have been found.

Finally, the State contends that evidence on the safety of therapeutic abortion was unavailable in 1968. This overlooks the earlier publication of numerous relevant studies in medical journals available at Maryland hospitals and libraries.[14] This evidence, referred to as "data of good

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[12] *See also Ivan* v. *New York,* 407 U.S. 203 (1972), holding *In re Winship,* 397 U.S. 358 (1970), retroactive; *Berger* v. *California,* 393 U.S. 314 (1969), holding *Barber* v. *Page,* 390 U.S. 719 (1968), retroactive; *Roberts* v. *Russell,* 392 U.S. 293 (1968), holding *Bruton* v. *United States,* 391 U.S. 123 (1968), retroactive.

[13] *Hardy* v. *Vuitch,* 473 F.2d 1370 (4th Cir. 1973); *United States ex rel. Williams* v. *Zelker,* 445 F.2d 451 (2d Cir. 1971); *YWCA* v. *Kugler,* 342 F. Supp. 1048 (D.N.J. 1972); *Harling* v. *Dep't of Health & Social Services,* 323 F. Supp. 899 (E.D. Wis. 1971); *State* v. *Ingel,* C.A. 14786 (Md. Cir. Ct., Prince George's County Apr. 12, 1973) (Couch, J.).

[14] Among the studies cited in Dr. Vuitch's evidence are Hubinot, *Abortion in Western and Southern Europe: A Preliminary Study*

quality" by the *United Nations Fertility Report*,[15] was primarily drawn from the years 1957-67, and was collected in a table which was part of Dr. Vuitch's evidence before the District Court.

It was also before this Court in *Roe* v. *Wade*, and *Doe* v. *Bolton, supra.*

As is evident, good quality data has long been available. Indeed, the earliest suggestions that abortion procedures be performed on an outpatient basis in a clinic or office can be traced back to 1925 and a paper by the famed Howard A. Kelly, M.D., of Johns Hopkins, on non-hospital uterine curettage, 9 Am. J. Obstetrics & Gynecology 78 (1925). *See also* Israel & Mazer, *Safety and Advantage of Office Curettage*, 36 Am. J. Obstetrics & Gynecology 445 (1938).

## II.

**The U.S. Court of Appeals and District Court correctly held that Respondent fully exhausted state remedies before seeking a writ of federal habeas corpus by attempting three times at trial and three times on direct appeal to adjudicate his claims that the Maryland Therapeutic Abortion Act was unconstitutional.**

Dr. Vuitch asserted defects in the convicting statutory provision under the Due Process and Equal Protection Clauses of the Federal Constitution. These defects unjusti-

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(Intnl. Conf. on Abortion, Hot Springs, Va., 1968); Potts, *Legal Abortion in Eastern Europe*, 59 Eugenics Review 232 (1967); and Tietze & Lehfeldt, *Legal Abortion in Eastern Europe*, 175 J. Am. Med. Ass'n 1149 (Apr. 1961).

[15] *Measures, Policies and Programmes Affecting Fertility, With Particular Reference to National Family Planning Programmes* 101 (U.N. 1972).

fiably abridge federally protected rights. Jurisdiction over this action for habeas corpus therefore rests upon the express provisions of the Federal Habeas Corpus Statute, 28 U.S.C. §2241 (1964), subject to the exhaustion requirement and related doctrines. See *Wilwording* v. *Swenson*, 404 U.S. 249 (1971) (per curiam); *Fay* v. *Noia*, 372 U.S. 391 (1963); *Brown* v. *Allen*, 344 U.S. 443 (1953); see generally *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1040 (1970).

Both the District Court and the U.S. Court of Appeals summarily rejected the State's claim on exhaustion of remedies. In concluding that "the state courts have had ample opportunity to investigate and consider petitioner's contentions" (Petition for Certiorari, at 3a), the District Court correctly applied the controlling legal standard to the facts of this case. This Court recently described the policy and scope of the exhaustion doctrine as "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson, supra*, 404 U.S. at 250. In another recent case the Court stated that "once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard* v. *Connor*, 404 U.S. 270, 275 (1971).

1. *The Montgomery County Circuit Court had three opportunities to resolve and did in fact decide the federal questions presented here.* Dr. Vuitch's trial was held in early July 1969. At trial, Dr. Vuitch, through his counsel, filed a written motion for judgment of acquittal pursuant to Rule 755 of the Maryland Rules of Procedure. This motion was based in part on his contention that the statute under which he was charged

> is unnecessarily broad and invades the area of protected freedoms of both the pregnant woman and the Defendant * * * is without compelling State interest sufficient to justify this encroachment upon personal liberty, and, consequently * * * is invalid and unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment. . . . [quoted in *Vuitch* v. *State*, 10 Md. App. 389, 394, 271 A.2d 371, 374 (Ct. Spec. App. 1970)].

The Circuit Court denied Dr. Vuitch's Motion for Judgment of Acquittal without comment, again denied the motion when it was renewed orally at the end of the trial, and for the third time rejected his contentions, as follows, when denying a motion for a new trial:[16]

> The second contention of the Defendant is that the statute under which Defendant is charged is unconstitutional as being a denial of equal protection of the laws in accordance with the *Griswold* case (*Griswold* v. *Connecticut*, 381 U.S. 479). The Court does not see that the instant case is comparable factually to *Griswold* and finds no denial here as charged [quoted in *Vuitch* v. *State*, 10 Md. App. 389, 271 A.2d 371, 378 n. 6 (Ct. Spec. App. 1970)].

2. *The Court of Special Appeals of Maryland had two opportunities to decide the federal questions.* On direct appeal to the Maryland Court of Special Appeals, Dr. Vuitch reasserted his constitutional challenge to the statute, and his claim was fully briefed and argued by both sides.

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[16] The Petition for Certiorari neglects to mention this ruling quoted in the text.

as well as by *Amici Curiae,* but the Court refused to decide it. Affirming the conviction, the Court ruled that the "constitutional issues * * * were not properly preserved for appellate review." *Vuitch* v. *State,* 10 Md. App. at 397, 271 A.2d at 376. The Court's ruling was grounded upon its conclusion that:

> The motion for judgment of acquittal is not an appropriate vehicle to challenge the constitutionality, facial or otherwise, of the statute under which the criminal prosecution is initiated [10 Md. App. at 397, 271 A.2d at 376].

According to the Court, Dr. Vuitch had waived his right to question the statute under which he was convicted, by reason of his failure to assert his constitutional challenges by a pre-trial motion pursuant to Maryland Rule 725(b), which provides in pertinent part:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion before trial.

Next, in a timely *Motion for Reargument and Stay of Mandate,* filed December 18, 1970, Dr. Vuitch urged that the case be reargued or remanded, pursuant to Maryland Rule 1071,[17] for full adjudication of the substantial constitutional issues involved herein. This motion was based, *inter alia,* on the fact that, since the procedural rule enforced by

[17] The State also neglects to mention this important Maryland procedural device in its review of the proceedings before the Court of Special Appeals.

the Court was unclear at best, it was unfair to hold that Dr. Vuitch had forever forfeited his right to an adjudication of the constitutionality of the convicting statute. Accordingly, he sought a remand for the full presentation and development of his challenge on constitutional grounds to the Maryland abortion statute. In opposition, the Attorney General argued that "there must be an end to litigation." The Court denied Dr. Vuitch's motion on January 22, 1971, without opinion. Thus the Court of Special Appeals had avoided two opportunities to decide the federal questions.

3. *The Court of Appeals of Maryland declined two opportunities to decide the federal questions.* After Dr. Vuitch petitioned the Court of Special Appeals of Maryland for reargument and remand, he attempted to secure further state court relief by petitioning the Court of Appeals of Maryland for a writ of certiorari (Appendix A hereto). This petition offered the highest court of Maryland, in effect, two opportunities for a review of the federal constitutional questions presented here. First, the Court could have directly reviewed the merits, as the trial court had done. Second, the Court of Appeals could have ordered the Court of Special Appeals to order a remand if more evidence were deemed necessary. Instead, the Court of Appeals denied certiorari, 261 Md. 729, as did this Court. 404 U.S. 868 (1971).

4. *Dr. Vuitch had no obligation to seek state post-conviction relief.* The State's contention that Dr. Vuitch has not exhausted state court remedies, wholly without merit, was thoroughly dealt with by the District Court and rejected out of hand by the U.S. Court of Appeals for the Fourth Circuit. The courts below correctly and compre-

hensively decided this question, and the State's contentions on this issue should be summarily rejected by this Court. Four times the Maryland appellate courts "had a fair opportunity to consider the [claimed denial of rights] and to correct [the] asserted constitutional defect * * *." *Picard* v. *Connor, supra,* 404 U.S. at 276. Although the merits were argued before the Maryland Court of Special Appeals, they were avoided on hyper-technical procedural grounds. The State's suggestion that the record was inadequate at that time ignores the facts that questions of constitutional law were at issue; that relevant medical facts could be judicially noticed and were presented to the Court of Special Appeals; and that Dr. Vuitch asked for a Maryland Rule 1071 remand, expressly permitted by the rule, to the trial court to develop the record further if the Court so desired. The remand request was summarily denied. At every level of the state judiciary, the State opposed a decision on the merits of Dr. Vuitch's constitutional claims. Indeed the State took the position that these claims had been *waived*. At every level, however, Dr. Vuitch presented the state courts with more than one opportunity to resolve the constitutional issues.

Nothing more could reasonably be required of Dr. Vuitch to satisfy the exhaustion requirement. He has on several occasions provided "an opportunity to the State courts to correct a constitutional violation * * *." *Darr* v. *Burford,* 339 U.S. 200, 204 (1950). Indeed, he has provided a far greater opportunity for a decision on the merits than is found in many decisions upholding federal habeas jurisdiction, including one case on an abortion law where Mr. Justice Tom C. Clark, sitting on the Second Circuit, found sufficient exhaustion by a physician petitioner who had

raised no federal constitutional questions at the trial level, but had raised them *pro se* on appeal, where they were summarily rejected. *United States ex rel. Williams* v. *Zelker*, 445 F.2d 451, 454 (2d Cir. 1971) (Clark, J.). See also *Roberts* v. *LaVallee*, 389 U.S. 40 (1967); *Brown* v. *Allen*, 344 U.S. 443 (1953). Comparable exhaustion questions have more recently been routinely set for summary disposition by the Court, as in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971) (per curiam).

If a claim has been fairly presented to State courts at trial and on direct appeal, there is no additional requirement to pursue state collateral remedies before seeking federal relief. E.g., *Brown* v. *Allen*, *supra*; *United States ex rel. Williams* v. *Zelker*, *supra*. Therefore, Dr. Vuitch's failure to seek relief under Maryland's Post-Conviction Procedure Act does not bar a ruling that state remedies had been exhausted within the meaning of the law.

Cases cited by the Attorney General are inapposite. In *Picard* v. *Connor*, *supra*, for instance, where this Court ruled that state remedies had not been exhausted, the constitutional issue involved—whether the indictment procedure violated Fourteenth Amendment rights—had never even been raised in the state courts. After examining "the pretrial, trial, and appellate papers," the Court did not "discover any indication of an attack" on the indictment on equal protection grounds. 404 U.S. at 274. The Court concluded that "it is not sufficient that the federal habeas applicant has been through the state courts"; he must have presented "the state courts with the same claim he urges upon the federal courts," *id.* at 275-276.

In contrast to the petitioner in *Picard* v. *Connor*, Dr. Vuitch sought from the beginning to adjudicate his consti-

tutional claims in state court. These claims were raised and decided three times at trial, and were asserted three times on direct appeal. Dr. Vuitch clearly gave the state courts the requisite "initial opportunity" to decide his claims.

Even if Post-Conviction Procedure Act ("PCPA") relief were technically still available, that is not sufficient because *in fact* no reasonable probability of state court adjudication remained for Dr. Vuitch.

Maryland courts have already ruled on direct appeal that, by failing to file a pre-trial motion, Dr. Vuitch *waived* his right to question the constitutionality of the statute. Ruling that the constitutional issues were not preserved for appellate review, the Court of Special Appeals reasoned that a challenge to the constitutionality of a criminal statute was a "defense or objection which may be *waived* unless presented by motion before trial."[18] 10 Md. App. at 398, 271 A.2d at 377 (emphasis added).

This finding of waiver would have been repeated in any state court collateral proceeding. Maryland's PCPA creates a presumption that a petitioner has waived any allegation of error not made at the time required by state rules of procedure. Md. Code Ann., art. 27, §645A(c). Since the Maryland Court of Special Appeals had ruled that Dr.

[18] The Attorney General had argued that federal constitutional challenges to state criminal statutes were waived unless raised by pretrial motion:

> The challenge to the constitutionality does not * * * go to the court's jurisdiction and under Rule 725b *the objection was waived by not being timely raised* * * *. Appellant's objection could, and should, have been raised by motion before trial, and was therefore *waived*. [*Brief of Appellee*, at 7-8, *Vuitch* v. *State*, 10 Md. App. 389, 271 A.2d 371 (Ct. Spec. App. 1970) (emphasis added).]

Vuitch's claim that the statute was unconstitutional was required to be made by a pre-trial motion, this claim was "waived" within the meaning of the Post-Conviction Procedure Act.

## III.

**The U.S. Court of Appeals and District Court correctly held that Abstention was inappropriate where no state law questions were involved and no relief was sought against a pending state court prosecution.**

Relying upon *Younger* v. *Harris,* 401 U.S. 37 (1971) and its companion cases, the State argues that the District Court should have abstained because the constitutional issues herein had been raised by Dr. Vuitch in other criminal prosecutions pending in state court.[19] The State ignores the fact that the fundamental issue in this case, as in every habeas corpus case, is whether or not the petitioner's detention violates his constitutional rights. Litigation of that issue cannot wait. Defense against one criminal prosecution cannot undo the injury suffered by unconstitutional imprisonment resulting from a different prosecution.

The Attorney General's reliance upon *Younger* v. *Harris* and its companion cases is thus misplaced. In each of these cases, the question was whether a three-judge federal court could enjoin a pending criminal prosecution in State court or issue a declaratory judgment as to matters involved in the pending State case. As the Court observed in *Samuels* v. *Mackell,* 401 U.S. 66, 73 (1971):

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[19] Both such cases were dismissed on April 5, 1972, thereby arguably mooting this claim by the State. See *State* v. *Vuitch,* I and II, Appendix, at 7a, 8a.

> [T]he practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecution will be frustrated as much by a declaratory judgment as it would be by an injunction.

In our case, we have no question of direct interference with a pending state court prosecution. The only question here is whether Dr. Vuitch's jail sentence was pursuant to an unconstitutional statute.

A federal habeas corpus petition by its nature raises questions that cannot be deferred.[20] As the Court has stated, "[F]ederal court jurisdiction is conferred by the allegation of unconstitutional restraint." *Fay* v. *Noia,* 372 U.S. 391, 426 (1963). No extraordinary circumstances exist which could justify postponement of a decision whether a present detention violates constitutional rights. In such a case as this one, where the convicting statute has been found to be invalid, the injury of unlawful incarceration is immediate, irreparable and extreme.

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[20] Cf. *Mitchum* v. *Foster,* 407 U.S. 225, 237 (1972), where the Court noted that federal habeas corpus remedy was a "specific and uniquely federal right or remedy" excepted from the anti-injunction statute.

## CONCLUSIONS

For the reasons set out in this Brief of Respondent in Opposition, the Court should either deny the petition for writ of certiorari or grant the petition and affirm the judgment below, holding *Roe* v. *Wade* and *Doe* v. *Bolton* fully retroactive.

Respectfully submitted,

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Washington, D.C. 20037
*Attorney for Respondent*

Dated: June , 1973.

# APPENDIX

## APPENDIX

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1970

Docket No. .....

MILAN M. VUITCH, M.D.,

*Petitioner,*

—v.—

STATE OF MARYLAND,

*Respondent.*

### Petition for Certiorari to the Court of Special Appeals of Maryland

The petitioner, Milan M. Vuitch, M.D. (hereinafter referred to as "Petitioner"), through his counsel, herewith petitions this Court for a writ of certiorari to the Court of Special Appeals for review of its judgment in the above-captioned case entered on November 24, 1970. *Vuitch* v. *State*, 10 Md. App. 389, 271 A.2d 371 (Ct. Spec. App. 1970).

I. *Jurisdictional Statement*

The opinion of the Court of Special Appeals was filed on November 24, 1970. (A copy of this opinion is attached hereto as Exhibit A.) In this opinion, the Court of Special Appeals affirmed the conviction of petitioner in the Circuit Court of Montgomery County (Shure, J.) on charges of

having performed an abortion in violation of *Md. Code Ann.*, Art. 43, §137 (Cum. Supp. 1970). Petitioner, through his counsel, filed a timely Motion for Reargument and Stay of Mandate on December 18, 1970. On January 22, 1971, this Motion was denied, and the Mandate was issued by the Court of Special Appeals.

The jurisdiction of this Court is invoked pursuant to *Md. Code Ann.*, Art. 5, §21A (Cum. Supp. 1970), and this Petition is filed in accordance with Rule 811(b) of the Maryland Rules of Procedure.

II. *Statement of the Case*

Petitioner was convicted in the Circuit Court of Montgomery County (Shure, J.) on charges of having performed an abortion at "a location which is not a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene * * *," in violation of *Md. Code Ann.*, Art. 43, §137 (Cum. Supp. 1970). A sentence of three years' imprisonment (with two years to be suspended after one year was served) and a $5,000 fine was imposed.

During the trial, petitioner filed a written motion for judgment of acquittal pursuant to Rule 755 grounded in part on his contention that the statute under which he was charged is "invalid and unconstitutional under the due process clauses of the Fourteenth Amendment to the United States Constitution. . . ." [10 Md. App. at 394, 271 A. 2d at 374]. This motion was denied without comment by the trial judge. Subsequent to his conviction but before sentencing, petitioner moved for a new trial, again asserting his constitutional defenses. In denying this motion, the trial court did comment on the constitutional issues involved:

> The second contention of the defendant is that the Statute under which defendant is charged is unconstitutional as being a denial of equal protection of the laws in accordance with the Griswold case (*Griswold* v. *Connecticut,* 381 U.S. 479). The Court does not see that the instant case is comparable factually to Griswold and finds no denial here as charged. [*State* v. *Vuitch* (Mont. Cy. Cir. Ct., Crim. No. 9954), Ruling on Motion For New Trial, dated November 16, 1969]

On appeal to the Court of Special Appeals, petitioner reasserted his constitutional challenge to the statute. The Court declined to consider the constitutional issues, ruling that the "constitutional issues . . . were not properly preserved for appellate review." [*Vuitch* v. *State, supra,* 10 Md. App. at 397, 271 A. 2d at 376.]

The Court's ruling was grounded upon its conclusion that

> The motion for judgment of acquittal is not an appropriate vehicle to challenge the constitutionality, facial or otherwise, of the statute under which the criminal prosecution is initiated. [*Ibid.*]

According to the Court, petitioner was thus precluded from gaining review of his constitutional defenses by reason of his failure to assert his challenges by a pre-trial motion pursuant to Rule 725(b).

In his Motion for Reargument and Stay of Mandate, filed December 18, 1970, petitioner urged that the case be remanded, pursuant to Rule 1071, to the trial court for full adjudication of the substantial constitutional issues involved herein. This Motion was based in part on petitioner's contention that the procedural requirement that constitutional defenses be raised pre-trial was at best un-

clear, and that, therefore, petitioner should not forever be foreclosed from raising these defenses by his initial choice of an inappropriate vehicle.

Petitioner's Motion for Reargument was also keyed to the observation by the Court of Special Appeals that

> [I]t would be foolhardy in the extreme to undertake the resolution of such complex constitutional questions upon a record as procedurally and substantively deficient as that now before us. . . . [10 Md. App. at 397, 271 A. 2d at 376.]

Accordingly, petitioner sought remand for the full presentation and development of a constitutional defense.[1] On January 22, 1971, petitioner's Motion was denied by the Court of Special Appeals, without an opinion.

III. *Reasons for Granting the Writ*

Review of the decision by the Court of Special Appeals in this case is clearly "desirable and in the public interest." *Md. Code Ann.*, Art. 5, §21A (Cum. Supp. 1970). Despite his attempts, petitioner has not yet obtained appellate consideration of the substantial constitutional issues involved in his conviction, nor has he, upon being deemed to have chosen an inappropriate procedural vehicle, been given the opportunity to develop the factual basis considered desirable by the Court of Special Appeals for decision of the constitutional questions presented herein.

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[1] By this Motion, petitioner did not, and does not now, abandon either his contention that the statute under which he was convicted is constitutionally defective on its face, or any other of the grounds upon which he asserts that his conviction must be reversed.

In its opinion on appeal, the Court of Special Appeals itself acknowledged the importance of prompt decision of these constitutional issues, in a manner which highlights the desirability and public importance of review by this Court:

> In concluding that the constitutional questions now sought to be raised were not properly preserved for appellate review, we do not seek to delay the day when these *important public issues* must be squarely met and decided, either by us, or the Court of Appeals of Maryland [10 Md. App. at 397, 271 A. 2d. 376 (emphasis added)].

This statement only underlines the obvious importance of a prompt resolution of the constitutional status of the Maryland abortion statute. Pending review, Maryland doctors and their patients, as well as petitioner, are being denied the benefit of an adjudication of the very substantial constitutional questions concerning the validity of the Maryland statute. Review at this time is particularly crucial since many of the basic issues involved in this case are presently before the United States Supreme Court. E.g., *United States* v. *Vuitch*, (U.S.) (No. 84, 1970 Term); *Roe* v. *Wade*, (U.S.) (No. 808, 1970 Term).

IV. *Conclusion*

Petitioner, reserving the right to file an amended, modified, supplemental or substitute Petition within, but

no later than, the period prescribed by Rule 812(a), respectfully submits that this Petition should be granted.

Respectfully submitted,

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## Order

IN THE

CIRCUIT COURT

FOR MONTGOMERY COUNTY, MARYLAND

Criminal No. 10328

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STATE OF MARYLAND,

—v.—

MILAN M. VUITCH, M.D.

*Defendant.*

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Upon consideration of the motion of the defendant, Milan M. Vuitch, M.D., to dismiss charges herein and State's consent thereto, it is thereupon, this 5th day of April 1973,

ORDERED that the Motion to Dismiss Charges filed herein by information be and it is hereby granted as to the defendant Milan M. Vuitch.

WALTER H. MOORMAN
*Judge of the Circuit Court for Montgomery County, Maryland*

**Memorandum and Order**

IN THE

CIRCUIT COURT

FOR WASHINGTON COUNTY, MARYLAND

Crim. Trial Nos. 2390, 2391

STATE OF MARYLAND,

—v.—

MILAN M. VUITCH, M.D.,

*Defendant.*

The decisions of the Supreme Court of the United States, on January 22, 1973 in Doe v. Bolton, —— U.S. —— and Roe v. Wade, —— U.S. ——, held that Statutes of Georgia and Texas were unconstitutional. These Statutes do not differ from Art. 27, ¶3 of the Maryland Code in sufficient degree to distinguish them for purposes of a constitutional test.

Accordingly, it is by the Circuit Court for Washington County, Maryland, this 5th day of April, 1973,

ORDERED, that the defendant's Motion to Dismiss is granted and the Warrant is dismissed.

s/ RUTLEDGE
*Judge.*